

Housing Law Bulletin

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614 Grand Avenue, Suite 320, Oakland CA 94610
Telephone (510) 251-9400 • Fax (510) 451-2300
www.nhlp.org • nhlp@nhlp.org

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Cover: Jingtowntown, a 53-unit affordable homeownership townhouse development in Oakland, CA. Built through a partnership between nonprofit developer Oakland Community Housing, Inc. and the City of Oakland. Photo by Jennifer Cheek Pantaléon; reproduced courtesy OCHI.

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Inquiries or comments should be directed to Eva Guralnick, Editor, Housing Law Bulletin, at the National Housing Law Project, 614 Grand Avenue, Suite 320, Oakland, CA 94610, Tel: (510) 251-9400 or via e-mail to nhlp@nhlp.org

State Courts Revisit Public Housing Trespass Policies

Over the past decade, many public housing authorities (PHA) have instituted "banning" or anti-trespass policies as a strategy to control drug and criminal activity or other management problems. These policies seek a laudable and permissible objective—to bar access to PHA premises by individuals with a known history of illegal activity that harms other tenants. However, in both their design and their application by some PHAs, such policies have also resulted in substantial abridgements of individual tenants' contractual and constitutional rights to use their homes, speak freely and associate with relatives and friends who have not engaged in any activity harmful to other tenants. After providing some background on the issue, this article reviews two recent state supreme court rulings evaluating anti-trespassing policies.

Background on the Banning and Trespass Issue

Like "one-strike" evictions for alleged drug and criminal activity by family members and guests, these cases are probably with us for some time to come, as various housing management policies intersect with constitutional limitations that have yet to be defined consistently by the courts. First arising in this area were cases involving PHA approval of overnight guests and short-term visitors. Most courts invalidated such policies,¹ but a few of them restricting longer-term stays were upheld.² Later, tenants challenged rules imposing

¹See, e.g., *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332 (2d Cir. 1981) (finding PHA's rule requiring prior registration and PHA approval for overnight guests violated tenants' constitutional rights of privacy and association and remanding claim for damages for constitutional violation, while dismissing declaratory and injunctive relief claims as moot when PHA rescinded policy); *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361 (1st Cir. 1985) (while expressly declining to consider constitutional privacy claim, holding PHA lease provision requiring written approval for overnight guests violated applicable HUD regulations requiring reasonable accommodation of guests and visitors). *Heritage Hills, Ltd. v. Smith*, No. 78-CV-G-268 (Ohio Mun. Ct., Chillicothe, May 8, 1978), 12 CLEARINGHOUSE REV. 192 (No. 24,215, July, 1978) (finding subsidized housing lease provision requiring prior approval unconscionable); *Wells v. Housing Auth. of Wheeling*, No. 90-0131-W(S) (N.D. W.Va. Jan. 26, 1993), 27 CLEARINGHOUSE REV. 137 (No. 48,883, June 1993) (PHA's guest registration policy violated 24 C.F.R. § 966.4(d), which requires reasonable accommodation of tenant guests). See also *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 92 Misc.2d 383, 400 N.Y.S.2d 306 (1977) (occasional overnight visitor does not violate subsidized housing lease provisions requiring reporting of income and family composition and prohibiting accommodations for boarders); *Martin v. Franklin Asset Management Co.*, No. C87-0035 BG(M) (W.D. Ky. Apr. 27, 1987), 21 CLEARINGHOUSE REV. 287 (No. 42,433, July 1987) (invalidating rule prohibiting any guest from remaining longer than two nights without written management approval); *Ashley Court Enters. v. Whittaker*, 249 N.J. Super. 552, 592 A.2d 1228 (App. Div. 1991) (refusing enforcement of lease provision barring recurring visits as unreasonable and vague).

²See, e.g., *Brookins v. Greater Gadsden Hous. Auth.*, 588 So.2d 474 (Ala. Civ. App. 1991) (upholding eviction for violation of rule requiring landlord consent for guests staying more than 14 days within a year); *New Boston Kivwanis Hous. Dev. Corp. v. Sparks*, No. 1957, 1992 Ohio App. LEXIS 2018, 1992 WL 79561 (Ohio App., 4th Dist., Apr. 14, 1992) (upholding lease provision requiring tenant to report changes in family composition where

curfews or other unreasonable restrictions on having guests or associating with other tenants on constitutional and regulatory grounds.³

More recently, housing providers, usually PHAs, have tried to reduce criminal and drug activity by prohibiting or banning certain individuals from project premises, and enlisting the assistance of the police to arrest subsequent violators for criminal trespass. Initially, banning was successfully challenged on various constitutional, statutory and contract theories similar to those used to challenge overnight guest approval requirements, primarily the tenants' rights of association and rights guaranteed by federal laws on reasonable lease terms or tenant use and occupancy. For example, tenants in Arkansas successfully settled their challenge to a PHA's rules that prohibited certain visitors in their apartments, and alleged PHA practices of maintaining a surveillance system that included the use of "snitches" and "peeping Toms," and of monitoring and stealing tenants' mail.⁴ In another case, Maryland tenants successfully challenged their PHA's practice of banning certain individuals from the premises, under criteria including alleged disturbances, lack of employment, and prior debts to the PHA.⁵ More recently, tenants of another Maryland PHA successfully challenged their PHA's banning policy, adopted under the apparent authority of a state law, which sought the arrest of individuals identified on a PHA log for criminal trespass if they appeared on the premises and, after warning and subsequent visitation, eviction of tenants who invited them.⁶ Numerous other challenges to banning practices in public and subsidized housing have been waged elsewhere, usually with favorable results for the tenants.⁷

long-term "guest" becomes a household member, and tenant can be evicted for failing to report and get permission).

³See, e.g., *Kent v. Housing Auth. of Omaha*, No. 8:CV94-00027 (D. Neb. order Apr. 13, 1994) (Clearinghouse No. 50,622) (after court issued temporary restraining order and PHA rescinded policy, dismissing as moot tenants' challenge to PHA's policy imposing 11 p.m. curfew on guests absent PHA approval, alleging violations of federal procedural regulations, other lease provisions, and constitutional rights); *Knight v. Sanford Hous. Auth.*, No. 97-1225-CIV-ORL-19B (M.D. Fla. order Jan. 30, 1998) (preliminary injunction barring PHA from enforcing new lease clause prohibiting any unauthorized gatherings on PHA property, waiving jury trial rights, and extra charges as additional rent).

⁴*Blundell v. Sharp*, No. PB-C-86-268 (E.D. Ark. settlement agreement Aug. 14, 1987), 21 CLEARINGHOUSE REV. 658 (No. 40,895, Nov. 1987) (settlement prohibited any PHA inquiry about guests visiting for fewer than 14 days in a 45-day period, barred PHA from allowing entry to anyone but tenant to an occupied unit, prohibited PHA from providing information to anyone about tenants' personal relationships and from recording licenses of visitors' automobiles, and stated that tenants may freely associate).

⁵*Miller v. St. Michaels Hous. Auth.*, No. Y91 2412 (D. Md. filed Aug. 26, 1991, settlement Dec. 11, 1992), 25 CLEARINGHOUSE REV. 1033 (No. 47,069, Dec. 1991), 26 CLEARINGHOUSE REV. 1493 (No. 47,069, Mar. 1993).

⁶*Diggs v. Housing Auth. of Frederick*, 67 F.Supp. 2d 522 (D.Md. 1999) (issuing preliminary injunction on §1983 claim for PHA's violation of statute and regulations permitting reasonable accommodation of guests and prohibiting unreasonable terms; no challenge to application of policy to individuals previously arrested for drug or criminal activity on PHA premises).

⁷*Setser v. Moline Hous. Auth.*, No. 92-CV-04085 (C.D. Ill. June 15, 1993), 28 CLEARINGHOUSE REV. 171 (No. 49,787 June 1994) (after PHA amended

In June of 2002, the state supreme courts in Virginia and Washington reviewed anti-trespassing policies, both ruling in the context of collateral attacks on criminal trespass convictions brought, not by tenants, but by defendants. The policies at issue were completely different in their details, and the courts used different reasoning to reach widely differing results.

Virginia

The Virginia Supreme Court ruled that the PHA's anti-trespass policy was challengeable by a criminal defendant, and that the policy was overly broad in violation of the First and Fourteenth Amendments to the United States Constitution.⁸

The Richmond Housing Authority had sought to eradicate illegal drug activity at Whitcomb Court, a PHA development described as an "open-air drug market." The Richmond City Council had enacted an ordinance closing the city streets in Whitcomb Court to public use and travel and abandoning them as city streets, conveying them to the PHA. The deed required the PHA to take steps to demonstrate that the closed streets were in fact private streets, and the PHA posted "No Trespassing" signs with warnings at each building and about every 100 feet along the streets.

Because most people arrested for drug crimes at Whitcomb Court were non-residents, the PHA then sought to deny access to its property to persons who did not have legitimate reasons to visit the premises. The PHA's trespass policy was not reduced to writing, but consisted of an "authorization" given to the local police to enforce state trespass law on PHA premises. Under the policy, the PHA or the police could ban an individual from its property if that individual was not a resident, employee, or could not demonstrate a "legitimate business or social purpose" for being

policy to exclude guests or family members, tenants voluntarily dismissed challenge to PHA's banning policy that subjected tenants to eviction if listed individuals appeared on PHA property; claims included violation of lease provisions and procedural requirements of federal law; plaintiffs subsequently awarded attorney fees as prevailing parties); *Souza v. Fall River Hous. Auth.*, No. 95 CV 00321 (Mass. Commw. Ct. June 11, 1996) (Clearinghouse No. 51,728) (granting partial summary judgment to tenant challenging PHA's trespass policy as violative of statutory right to accommodate guests and constitutional right of free association); *Campbell v. Plymouth Hous. Auth.*, No. 94-01175ONG (D. Mass. filed Oct. 28, 1994) (Clearinghouse No. 50,484) (on constitutional, federal statutory and state law grounds, challenging PHA's policy requiring advance approval for all guests and seeking to ban and arrest for trespass lawfully invited tenant guests with no showing of criminal activity or threat to quiet enjoyment). See also *McRae v. Delsea Garden Apts.* (D.N.J. filed Aug. 2000) (Clearinghouse No. 53,163) (via §1983, Section 8 project-based tenant seeks to enjoin owners, managers and police department from prohibiting and arresting for trespass those visitors deemed a "threat to health and safety" with no stated factual basis and no procedural protections, as violative of her federal and state constitutional rights to familial association and due process, her lease and the covenant of quiet enjoyment); *Vasquez v. Housing Auth. of El Paso*, 271 F.3d 198 (5th Cir. Nov. 5, 2001) (PHA's invocation of trespassing policy against non-resident political volunteers is unconstitutional violation of tenant's First Amendment rights to receive political information); *contra*, *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994) (PHA's policy restricting access to individuals neither residents nor guests is constitutional as applied to political information).

⁸*Commonwealth v. Hicks*, 264 Va. 48, 563 S.E.2d 674 (Va. June 7, 2002).

2002 Housing Justice Network Meeting Set for December 8-9

Pre-HJN Meeting Housing Training Set for December 7

Make all your reservations now!

The 2002 meeting of the Housing Justice Network (HJN) is scheduled to take place on Sunday and Monday, December 8 and 9, in Arlington, Virginia (Washington, D.C. area). The HJN meeting will be preceded by a one-day training event, set for Saturday, December 7, on recent developments in federal housing law (Public Housing, Voucher, and the Project-Based Section 8 programs).

The HJN meeting and the pre-meeting training will be held at the Hilton Hotel, located at 2399 Jefferson Davis Highway, Arlington, VA (Near the D.C. National Airport), Arlington, VA, 22202. Special room rates for the training event and the HJN meeting are: \$99 for single or double occupancy per night. Room reservations must be made directly with the hotel. To receive the special rates, **RESERVATIONS MUST BE MADE ON OR BEFORE NOVEMBER 6, 2002**. The hotel phone number is (703) 418-6800. **When making reservations, make sure to mention that you are making a reservation for the National Housing Law Project/Housing Justice Network Meeting.**

The purpose of the 2002 HJN meeting is to focus the activities of the various HJN working groups on the recent changes to the federal housing programs, particularly those made to the Public Housing, Certificate and Voucher and Section 8 programs and to discuss how advocates can continue to represent low-income clients' interests in light of those changes and in light of the November elections, which will precede the meeting by a month.

The HJN meeting is not designed as a training conference. We encourage attendance by housing advocates and clients who are willing to actively participate in HJN's ongoing activities. These include exchanging information on effective representation of low-income tenants and community organizations in addressing local housing problems and pursuing permissible legislative and administrative advocacy at the federal, state and local levels.

NHLP will be offering a separate one-day training event on the federal housing programs immediately preceding the HJN meeting. We expect that the training will facilitate the HJN meeting by providing advocates an opportunity to learn about the program changes in detail prior to the meeting and, as a result, to be better prepared to participate in the HJN discussions.

The HJN meeting registration fee is \$325 and includes two lunches, break refreshments and conference materials. For legal service organizations who are paying for clients to come to the meetings a discount of \$100 is available for the client's registration.

The one-day training registration fee is \$150 for persons who do not attend the HJN meeting. The registration fee includes a lunch and training materials. Persons who attend both the pre-HJN training event and the HJN meeting may register for both events for \$425. (For clients whose costs are being paid by a legal services program, the combined registration fee is \$325.) The registration deadline for the meeting and the training is Friday, **November 6, 2002**. **Registrations received by NHLP after November 6 will be charged a \$150 late fee for the meeting and a \$50 late fee for the training.** Registration checks should be made payable to the National Housing Law Project and sent to our Oakland Office at 614 Grand Avenue, Suite 320, Oakland CA 94610.

A detailed announcement setting out the meeting and training agendas and registration materials will be sent shortly to HJN members and housing specialists at legal services and other programs. A copy of the invitation letter, meeting and training agendas, and the registration forms are available from our Web site, www.nhlp.org. If you need additional information, call NHLP at (510) 251-9400, Ext. 111 or e-mail us at nhlp@nhlp.org.

on the premises. After receiving either written or oral notice of the ban from either the PHA or the police, a person could then be arrested for trespass if remaining on or returning to the premises.⁹

The Virginia court found the PHA's trespass policy invalid. Even though the trespass policy is intended to punish activities unprotected by the First Amendment, the policy also prohibits clearly protected speech and conduct, and thus is overly broad.

As a part of its unwritten policies, the PHA's property manager was required to determine whether a person could demonstrate a legitimate business or social purpose to access the premises. Individuals seeking access to the development and the private streets had to obtain the manager's permission. If someone sought to disseminate materials or participate in an activity on the property, that person had to obtain her authorization, and sometimes the request would be referred to a "community council" which met with "the Board and the residents." If someone requested to distribute flyers and the request was not "routine," she referred that request to the other PHA staff. The PHA, however, had no written policies or procedures to govern decisions regarding who may distribute materials or participate in activities on the premises.

Pursuant to the PHA's unwritten policies, an unauthorized individual who used the premises received a warning from the local police, and the PHA would send a banning letter to that individual.

Kevin Hicks was issued a summons for trespass when the police saw him walking on a sidewalk on a "private street" located within the development. The officer had known Hicks for about four years, and also knew that he had been previously notified of his ban by the manager. He had been arrested twice previously for trespass on the property, and had previously signed a hand-delivered "barment notice." One of the reasons for his presence that he gave to the officer was that he was bringing diapers to his son, who lived there with his mother.

Hicks was charged with trespass and three violations of the conditions of suspended sentences received for prior trespass convictions. After trial and conviction in a lower district court, Hicks appealed the convictions and moved to dismiss the charges on the basis that the PHA's trespass policy violated the First and Fourteenth Amendments to the Constitution of the United States. The reviewing court denied the motion, and conducted another bench trial, also convicting him of trespass, with a suspended sentence of one year

in jail, and revoking his prior suspended sentences. On appeal to the Court of Appeals, a panel initially affirmed the judgment,¹⁰ but the Court of Appeals *en banc* disagreed and vacated the conviction, finding the PHA's policy unconstitutional.¹¹ The Commonwealth then appealed, producing this decision.

The PHA first argued that its policy could not be collaterally attacked by a challenge to the criminal conviction, but that instead an aggrieved individual must file a civil constitutional challenge. All of the justices rejected this contention.

Turning to the question of the validity of the PHA's policy, Hicks argued that the policy was overly broad, violating the fundamental constitutional right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States, made applicable to the states under the Fourteenth Amendment's due process clause. For its part, the Commonwealth disagreed, also asserting that a defendant raising a facial constitutional challenge must demonstrate a substantial risk that application of the policy will suppress protected speech.

After reciting its view of applicable U.S. Supreme Court principles on overbreadth challenges to laws abridging free speech, the court found the PHA's trespass policy invalid. Even though the trespass policy is intended to punish activities unprotected by the First Amendment, the policy also prohibits clearly protected speech and conduct, and thus is overly broad. To reach this question, the court also had to find that Hicks could assert a facial constitutional challenge even though a portion of the policy was unwritten, noting that holding otherwise would permit the government to violate First Amendment protections simply by refusing to memorialize unconstitutional policies in writing.

On the main constitutional question, particularly significant for the court was the fact that the PHA had no written procedures or guidelines delineating how someone could obtain permission for access or how the policy should be enforced. The PHA manager, with "unfettered discretion," determined whether a non-resident had authorized access or could distribute literature on the premises. The manager had further testified that she would give permission to distribute material only if she was "used to seeing" it. The court pointed to these as the most fatal flaws of the policy:

Based upon the record before this Court, ...[the manager] has the unfettered discretion to determine not only who has a right to speak on the Housing Authority's property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official.¹²

¹⁰*Hicks v. Commonwealth*, 33 Va.App. 561, 535 S.E.2d 678 (2000).

¹¹*Hicks v. Commonwealth*, 36 Va.App. 49, 52, 548 S.E.2d 249, 251 (2001).

¹²563 S.E.2d at 681.

⁹563 S.E.2d at 676.

The Virginia Supreme Court thus affirmed the judgment of the Court of Appeals on the narrow basis that the PHA's trespass policy was overly broad and that Hicks used this invalidity to challenge his criminal prosecution.¹³ Two of the dissenting justices, while agreeing that Hicks could seek constitutional review of the policy to challenge his criminal conviction, would have found that he had no standing to assert First Amendment overbreadth, as his conduct did not involve protected speech. Even crediting his account that he was bringing diapers for his son, the dissent stated that the visitation of family members did not involve the exercise of a fundamental right of privacy that includes the freedom to maintain certain intimate relationships. Thus, citing the U.S. Supreme Court's recent *Rucker* ruling upholding HUD's one-strike policy,¹⁴ it would have upheld the PHA's policy as rationally related to the legitimate governmental objective of drug crime reduction.

Washington

A very different case was decided the day before at the other end of the country. The Supreme Court of Washington came to a different conclusion, upholding the Bremerton Housing Authority's (BHA) much more specific anti-trespassing policy against a constitutional challenge.¹⁵ While also agreeing with the Virginia court that a criminal defendant may raise a challenge to the policy's constitutionality in an appeal from a criminal conviction, the Washington court held that the BHA policy did not facially violate any due process right to intimate association held by a non-cohabiting engaged couple. In the court's view, no such right exists. The court also upheld the policy against overbreadth and void-for-vagueness challenges. However, reviewing eight separate convictions of the two non-resident defendants, the court affirmed only those four that were based on conduct outside of the scope of lawful invitations to visit the premises, reversing four others based on conduct within the scope of their invitations.

Two defendants, Karl Widell and Larry Blunt, had been convicted in separate jury trials of multiple counts of criminal trespass, based on violations of the BHA anti-trespassing policy governing its Westpark development, a 74-acre, 582-unit development of single-family homes, duplexes, and fourplexes. The cases were consolidated for appeal and affirmed by a reviewing court. The Washington Supreme Court then accepted direct review.

In 1996, in response to criminal activity in Westpark, BHA established an anti-trespassing policy permitting the

revocation of a nonresident's license to be on the common areas of the premises if the nonresident is found engaging in specified criminal and offensive conduct, including, among other things, the making of "unreasonable noise" and "fighting."¹⁶ Pursuant to this policy, a person is issued a "trespass warning" when observed engaging in specified conduct. This warning informs the recipients that they "are prohibited from entering or remaining on the common areas for any reason whatsoever" and that entering or remaining on the premises may result in arrest for criminal trespass. The warning further provides notice of a right to appeal the exclusion, as well as a method for obtaining a temporary waiver. The BHA has contracted with the local police to enforce this policy. This Bremerton policy was far more specific than the one reviewed by the Virginia court, both in the standards used to justify a warning or banning order and in specifying procedures to challenge any such action.

Petitioner Blunt's fiancée resided at Westpark, and Blunt had received a trespass warning from the police for an incident involving assault and lewd conduct. Then, over a six-month period, Blunt was charged with six counts of criminal trespass. On at least three of the occasions giving rise to the charges, Blunt was seen walking through Westpark's common areas. At three other times, he was getting out of a taxi in front of his fiancée's home with his fiancée, traveling in a car on a public street in the development, or at his fiancée's home before fleeing police on the path along the public street.

¹⁶BHA's exclusion policy states:

Any non-resident will be directed to leave and will be barred from returning to any Housing Authority of the City of Bremerton (BHA) development within which that person:

1. Makes unreasonable noise;
2. Engages in fighting or in violent or threatening behavior;
3. Substantially interferes with any right, comfort or convenience of any BHA Resident or employee;
4. Engages in any activity which constitutes a criminal offense;
5. Engages in any activity involving firearms, illegal drugs or violence;
6. Damages, defaces or destroys any property belonging to BHA, or and [sic] BHA Resident or employee;
7. Litters on any BHA property;
8. Drives in a careless or reckless manner;
9. Consumes or possesses an open container of any alcoholic beverage on the common areas without being accompanied (meaning actual physical presence) by an adult (meaning 21 year or older) Resident (meaning listed on page 1 of the lease) of that development;
10. Engages in gang activity, including, but not limited to:
 - a. Grouping to show gang affiliation or to intimidate rival gangs, residents or employees, or
 - b. Using hand signals or gestures for the purpose of intimidation, or for the purpose of provoking a violent response; or
11. Violates any applicable city or county curfew ordinance.

Any person who fails to leave the property after being directed to do so, or who returns to the property after being given such direction, will be subject to arrest and prosecution for Criminal Trespass.

¹³The Court of Appeals had decided this case on the basis that the PHA's private streets constitute a public forum and that the policy regulating speech in that forum violated the First Amendment. The Virginia Supreme Court did not need to resolve that issue, reserving its consideration for another case, along with other claims.

¹⁴*Department of Hous. & Urban Dev. v. Rucker*, ___ U.S. ___, 122 S.Ct. 1230, 1232, 152 L.Ed.2d 258 (2002) (citing "reign of terror" imposed by criminal activity in public housing).

¹⁵*City of Bremerton v. Widell*, 146 Wash.2d 561, 51 P.3d 733, 2002 WL 1206584 (Wa. June 6, 2002).

Petitioner Widell's fiancée also lived in Westpark, and he received a trespass warning based on disorderly conduct and assault. When police subsequently saw him twice on the premises, he was charged with two counts of criminal trespass. Once, he was seen on the outer perimeter of Westpark, several blocks from his fiancée's home, and later he was seen with his fiancée at an intersection in Westpark.

The Bremerton policy was far more specific than the one reviewed by the Virginia court, both in the standards used to justify a warning or banning order and in specifying procedures to challenge any such action.

Both petitioners were convicted on all eight counts in separate jury trials. Under state and local law, one charged with trespass may defend by showing, among other things, that the premises were open to the public and that all lawful conditions imposed had been fulfilled, or that the actor reasonably believed that the owner or other person empowered to license access would have licensed the actor's entry or continued presence.

The defendants raised several challenges to their convictions: (1) that the invitations of their fiancées to be on Westpark property prevail over any BHA exclusion rights; (2) that exclusion unduly burdened each's right of "intimate association" by denying the right to visit his fiancée; and (3) that BHA's anti-trespassing policy is unconstitutionally overbroad and void for vagueness.

Analysis of these arguments first required evaluation of the statutory defense. Under state law, once a defendant offers some evidence that entry was permissible, the prosecution must prove that the defendant lacked license to enter. Based on cases from other states,¹⁷ the defendants had argued that a tenant's invitation to them as guests overcomes an owner's prohibition from entering the premises' common areas, *i.e.*, that a tenant constitutes another person empowered to license access for purposes of the statutory defense. While recognizing this common law rule,¹⁸ the Washington

court emphasized that this rule coexisted with another long-standing common law rule—that the landlord had no obligation to protect his tenants, a rule which has been eroded in the modern era,¹⁹ but never directly decided in Washington.²⁰ While suggesting that such a duty would justify the right to exclude persons who may foreseeably cause such injury, the court proceeded to apply the common law rule, focusing on whether access of a nonresident was properly licensed and whether the incursion fell within the scope of that license. In other words, an invited visitor may proceed only through those common areas necessary for ingress and egress from the unit of the tenant issuing the invitation.²¹

Under this view of the common law rule, sustaining the convictions requires the city to show either that the defendants lacked an invitation to the premises at the times they received the criminal trespass citations or that they exceeded the scope of their invitation. The city had offered evidence that both Widell and Blunt had received warnings from police officers, acting on behalf of the BHA, not to enter the premises. The defendants then each offered evidence of open invitations from their respective fiancées to come to their apartments. Because the city failed to overcome the evidence that the fiancées' standing invitations provided permission, their convictions could stand only if a rational juror could have found (beyond a reasonable doubt) that they exceeded the scope of the invitations on any of the occasions charged as trespassing.

Applying this analysis, the court found that on three of the incidents charged, Blunt was not traveling on the street or sidewalk to his fiancée's door, but instead several blocks from her unit, in the common areas between houses, by himself. In the view of the city and the court, this evidence supported a conclusion that Blunt was exceeding the scope of any invitation he possessed. On the other three occasions, Blunt was either with his fiancée at her home or on a pathway along the public street of her residence, and this evidence could not support any such conclusion. With respect to Widell, however, on one occasion the police saw him alone on the premises several blocks from his fiancée's home, justifying a rational conclusion that he exceeded the scope of any invitation he may have had. The other incident involved his presence at an intersection of two public streets with his

¹⁷*E.g.*, "The common law is clear that the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area. Moreover, the law is clear that an invitee or licensee who does so, even after a specific prohibition by the landlord, is not a trespasser and does not violate a criminal trespass statute." *State v. Dixon*, 169 Vt. 15, 725 A.2d 920, 922 (1999) (citations omitted); see *State v. Schaffel*, 4 Conn. Cir. Ct. 234, 229 A.2d 552, 562 (1966); *Arbee v. Collins*, 219 Ga.App. 63, 463 S.E.2d 922, 925 (1995).

¹⁸*See, e.g., City of Seattle v. McCreedy*, 124 Wash.2d 300, 877 P.2d 686 (1994) (recognizing that landlords and tenants possess joint control over the common areas, holding that city inspectors have authority to inspect the common areas at tenant's invitation); *State v. Fox*, 82 Wash.2d 289, 510 P.2d 230 (1973) (overturning trespass convictions of legal services attorney and union organizer who, at farmworkers' invitation, entered boarding area of farm over owner's objection).

¹⁹*See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C.Cir.1970) (landlords owe tenants a duty of care to protect against foreseeable third party criminal acts); Tracey A. Bateman & Susan Thomas, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R.5th §4 [a]-[c], at 257 (1996) (addressing cases holding that landlord has duty to protect tenants against reasonably foreseeable criminal acts of third parties).

²⁰*Griffin v. West RS, Inc.*, 143 Wash.2d 81, 83, 18 P.3d 558 (2001) (declining to rule on whether residential landlord is legally obliged to protect tenants from foreseeable third party criminal acts).

²¹"[A] tenant's guest may not proceed at will to a part of the premises wholly disconnected to the purpose of the invitation and use the invitation as a defense to a charge of criminal trespass." *City of Bremerton*, citing *Arbee v. Collins*, 219 Ga.App. 63, 463 S.E.2d 922, 925-26 (1996); *Cf. Konick v. Champneys*, 108 Wash. 35, 41, 183 P. 75 (1919) (owner may reasonably limit access of tenants' guests in common areas).

fiancée, near her unit, and was thus insufficient to support such a finding.

Since these convictions were not negated by the statutory defense, the court then proceeded to evaluate the constitutional validity of the policy. The primary claims raised by the defendants were based upon the right of “intimate association,”²² and upon the doctrines that the law was overbroad in criminalizing protected activity and void for vagueness, or lack of sufficient specificity. Concerning the intimate association claim, the Washington court referred to various U.S. Supreme Court precedents to define its core (“protecting choices to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding individual freedom”) and its boundaries (“intimate human relationships related to the creation and sustenance of family,” including marriage, childbirth, raising and educating of one’s children, and cohabitation with relatives).²³ But on the question of whether the right of intimate association applies to nonfamilial relationships, like those between the defendants and their fiancées, the court blinked. While acknowledging that the Supreme Court has not expressly restricted protection only to familial relationships,²⁴ since no case has explicitly extended such protection, the court refused to recognize protection for nonfamilial relationships, confining associational rights to the familial situations so far recognized by the privacy cases. Because the court found no protected interest for defendants to enter the premises (at least in those instances where it found that the entry exceeded the scope of the invitation), it also did not need to reach the due process adequacy of the procedures surrounding the BHA’s banning action.

The court then summarily rejected the final claim that the anti-trespassing policy was overbroad, stating that such claims are generally confined to laws restricting First Amendment activities, and the court found no such activities on the

facts before it.²⁵ This view of whether litigants not engaging in protected expressive activities may challenge overbroad laws suppressing expression contrasts sharply with that of the Virginia Supreme Court in *Hicks*. It may well be that because the standards of the BHA policy are drawn so that protected expressive activities would rarely be subject to banning, there was no such claim to present to the court. The court also rejected any Fourteenth Amendment void-for-vagueness claim that the policy lacked sufficiently ascertainable standards to guide individuals and protect against arbitrary enforcement, finding that the policy did not define a criminal offense and was not part of the local criminal code, but only identified grounds for exclusion. While this logic may not be compelling, the specifics of the BHA policy likely rendered difficult any vagueness challenge nonetheless.

Conclusion

Although the Virginia ruling emphasized the PHA policy’s potential abridgment of speech, an equally significant issue is the breadth of the PHA’s discretion to determine who is subject to a banning order, and what standards must apply. What non-resident conduct poses a demonstrable threat to the health and safety of other tenants? What procedures exist both for tenants who might invite them and for non-residents seeking access to challenge any such finding by the PHA or the police? These questions lie at the heart of the experience of many tenants under banning and trespass policies, both those uncodified like Richmond’s, as well as others more specific, and should therefore present slightly different variations on the applicable legal analysis.

Although the policy at issue in the Washington case contains specific safeguards against arbitrary and abusive exclusions, many other banning policies do not. The *City of Bremerton* court’s analysis should not be transferred easily to other cases brought by residents to challenge less specific and more heavy-handed policies, since it lacks any analysis on the rights of the tenants. These rights to associate with persons of their choosing, so long as they are not engaged in activities that are harmful to other tenants, and have no recent history of doing so, derive not only from the Constitution, but also the governing law concerning “reasonable” lease terms applicable to most of the federal housing programs²⁶ and their lease agreements. Policies that seek to restrict access of guests through the common areas necessary to reach a tenant’s apartment at the invitation of a tenant, that insufficiently specify legitimate activity as grounds for banning, or that provide no procedures for challenging a ban, should still receive close judicial scrutiny. ■

²²The court cited *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), where the U.S. Supreme Court identified two types of constitutionally protected associational rights: “expressive association” (involving First Amendment protections of speech, assembly, petition for the redress of grievances, and the exercise of religion) and “intimate association” (derived from due process concepts of the Fourteenth Amendment and the principles of liberty and privacy found in the Bill of Rights).

²³Citing *Roberts*, 468 U.S. at 618-619, and cases cited therein.

²⁴In *Board of Directors of Rotary International v. Rotary of Duarte*, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987), the Supreme Court specifically noted that it had “not held that constitutional protection is restricted to relationships among family members.” Instead, the *City of Bremerton* court then cited the Supreme Court’s endorsement of a continuum approach, delineating where the “objective characteristics locate [the relationship] on a spectrum from the most intimate to the most attenuated of personal attachments,” (citing *Roberts*, 468 U.S. at 620), with protected relationship distinguished by “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in the critical aspects of the relationship” (citing *id.*). However, while then recognizing that the engagement relationship involved in the case shares these features, the court refused to extend protection because of its generalized finding that engagement without cohabitation is culturally “non-critical.”

²⁵At the same time, the court refused to extend the Washington state constitution’s due process clause to encompass an overbreadth doctrine to non-familial personal rights not involving the First Amendment, also commenting that, in any case, the policy posed no “direct and substantial” burden on intimate association.

²⁶42 U.S.C.A. §1437d(l)(2) (West Supp. 2001) (each PHA “must utilize leases which do not contain unreasonable terms and conditions”); 12 U.S.C.A. §1715z-1b(b)(3) (West 2001) (“...the Secretary shall assure that ... leases approved by the Secretary ... do not contain unreasonable terms and conditions”).